



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

August 18, 1995

Honorable George W. Bush
Governor of Texas
P.O. Box 12428
Austin, Texas 78711

Letter Opinion No. 95-052

Re: Whether a county judge may
simultaneously serve on the Texas Board
of Criminal Justice (ID# 33185)

Dear Governor Bush:

You have requested our opinion as to whether a member of the Texas Board of Criminal Justice (hereafter "the board") may simultaneously hold the position of county judge. You indicate that the individual in question was appointed to the board in February 1993 and that his appointment was confirmed during the regular session of the Seventy-third Legislature. In November 1994 he was elected county judge of Cameron County, a position he assumed on January 1, 1995. You ask whether such dual office-holding violates the common-law doctrine of incompatibility of offices or the separation of powers requirement found in article II, section 1 of the Texas Constitution.¹

The doctrine of incompatibility "prevents one person from holding two offices if the duties are inconsistent or in conflict, or if one office is subordinate to the other." Attorney General Opinion JM-203 (1984) at 3 (citing *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgm't adopted); *Kugle v. Glen Rose Indep. Sch. Dist. No. 1*, 50 S.W.2d 375 (Tex. Civ. App.—Waco 1932), *aff'd in part, rev'd in part on other grounds sub nom. Pruitt v. Glen Rose Indep. Sch. Dist. No. 1*, 84 S.W.2d 1004 (Tex. 1935)). In the situation you present, the branch of the incompatibility tree referred to as "conflicting loyalties" may be applicable. "[This] aspect of the doctrine . . . suggests that offices are incompatible if their duties are or may be inconsistent or in conflict, but not if their duties are wholly unrelated, are in no manner inconsistent, and are never in conflict." Letter Opinion No. 95-29 (1995) at 3 (citing 60 TEX. JUR. 3D *Public Officers and Employees* § 39, at 395 (1988)).

¹You do not raise Texas Constitution article XVI, section 40, which we would agree is not applicable here. This section prohibits an individual from holding, at the same time, more than one "office of emolument." Clearly, the office of county judge of Cameron County is one of emolument. See Tex. Const. art. XVI, § 61. Members of the board, on the other hand, while they are "entitled to reimbursement for actual and necessary expenses," are "not entitled to compensation." Gov't Code § 492.002(c). Thus, the individual in question does not hold more than one "office of emolument," and, as a result, his simultaneous occupancy of the two positions does not contravene article XVI, section 40 of the Texas Constitution.

Conflicting loyalties incompatibility is illustrated by the case of *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152. There, the court held that the two offices of school trustee and town alderman were incompatible as a matter of law because the school district and the town shared a common geographical area and the board of aldermen exercised supervisory powers over school property located in the town and over the duties of the trustees performable within the town's limits. *Id.* at 153. On numerous occasions, this office has employed conflicting loyalties incompatibility to prohibit a person from simultaneously serving as a member of the governing bodies of two different political subdivisions. See, e.g., Attorney General Opinion JM-129 (1984); Letter Opinion No. 93-22 (1993).

In recent years, this office has recognized that the doctrine proscribes simultaneous service whenever there is an existing or anticipated contract between two political subdivisions. For example, in Attorney General Opinion JM-133 this office held that the office of county auditor was incompatible with that of city council member of a city located in the same county. Attorney General Opinion JM-133 (1984) at 2. That opinion was based on the existence of several statutes authorizing contracts between cities and counties and the auditor's power to withhold approval of expenditures of county funds, which power could be invoked as to a contract between the county and the city of which the auditor was a councilman. See *id.*; see also Letter Opinion Nos. 92-4 (1992) at 2 (concluding "that one person may not simultaneously hold the position of county tax assessor-collector and member of the board of trustees of a school district which contracts with the county to assess and collect its taxes"), 90-18 (1990) (incompatibility barred person from serving as city council member and water district board member when contract was likely between city and district).

The individual in question is a member of two governing bodies that the legislature has expressly authorized to enter into contracts with each other. A commissioners court is the "governing body" of a county, and the county judge its "presiding officer." Together, the commissioners and the county judge "compose the County Commissioners Court." Tex. Const. art. V, § 18(b). The Texas Board of Criminal Justice, on the other hand, is the "governing body" of the Texas Department of Criminal Justice. Gov't Code § 492.001. You draw our attention to section 495.001(a) of the Government Code, which provides:

(a) *The board may contract with a private vendor or with the commissioners court of a county for the financing, construction, operation, maintenance, or management of a secure correctional facility. [Emphasis added.]*

We believe that section 507.001(a) of the Government Code also is pertinent to your question, although you have not mentioned that provision. Section 507.001(a) provides in part:

The state jail division, with the approval of the board, may contract with the institutional division, a private vendor, or the commissioners

court of a county for the construction, operation, maintenance, or management of a state jail felony facility. . . . The board may contract with a private vendor or the commissioners court of a county for the financing or construction of a state jail felony facility.²
[Emphasis and footnote added.]

Although sections 495.001 and 507.001 provide that "[t]he board *may* contract . . . with the commissioners court" (emphasis added) and "[t]he state jail division, with the approval of the board, *may* contract with . . . the commissioners court" (emphasis added), the fact that these statutory provisions do not mandate that the board (or the state jail division, with the board's approval) and the Cameron County Commissioners Court enter into contracts does not affect the application of the doctrine of incompatibility.

A power to act imports a duty to act when the public interests suggest to the unfettered official judgment that something should be done. If anything, the existence of discretion as to whether, when, and upon what basis to act, calls for a greater margin of freedom from the distracting demands of another office. The significant fact is that the Legislature entrusted these matters to the judgment of the several public bodies and thereby charged their officers with the obligation to exercise their authority in the best interests of their respective constituents.

McDonough v. Roach, 171 A.2d 307, 309-10 (N.J. 1961). "It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices." 63A AM. JUR. 2D *Public Officers and Employees*, § 78, at 728 (1984) (footnote omitted). We believe the public policy underlying the doctrine of incompatibility compels its application to two offices that have potentially conflicting functions established by a statutory plan, regardless of whether the conflicting functions are mandatory or discretionary.

A letter brief submitted to our office by attorneys for the individual in question states that the board has never approached Cameron County to enter into a contract under section 495.001(a) of the Government Code. The letter brief also states that Cameron County has never applied to the board for the construction of a secure correctional facility and has no intention to do so. We understand the brief to argue that any concern raised by section 495.001(a), being "purely hypothetical," is too attenuated to invoke the prohibition against simultaneous holding of incompatible offices.

²The Seventy-fourth Legislature has amended the first sentence of this language in section 507.001(a) by adding "a community supervision and corrections department" to the list of entities with which a state jail division may enter into contracts. See Act of May 25, 1995, 74th Leg., R.S., ch. 321, § 1.097, 1995 Tex. Sess. Law Serv. 2774, 2800 (to be codified as Gov't Code § 507.001). This amendment becomes effective on September 1, 1995. *Id.* § 3.021.

section 495.001(a), being "purely hypothetical," is too attenuated to invoke the prohibition against simultaneous holding of incompatible offices.

We believe this argument has no merit. As the Supreme Court of New Jersey stated in *Jones v. McDonald*, 162 A.2d 817 (1960), a case involving conflicting loyalties incompatibility,

It is no answer to say that the conflict in duties outlined above may never in fact arise. It is enough that it may in the regular operation of the statutory plan. 'If the duties are such that placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.'

Id. at 820 (quoting *DeFeo v. Smith*, 110 A2d 553, 556 (N.J. 1955) (citation omitted)). In Letter Opinion No. 95-29, for example, we concluded that conflicting loyalties prevented a county attorney from simultaneously serving as a school trustee in the same county, in part, "because the county attorney is constitutionally and statutorily vested with the authority to investigate matters and institute proceedings regarding the possible criminal conduct of school district officers." Letter Opinion No. 95-29 (1995) at 4. It was sufficient there that the constitution and the legislature had granted the county attorney a power that generated a conflict of duties; there was no need to speculate on how likely it was that school district officers might engage in criminal conduct. *See also McDonough*, 171 A.2d at 310 ("incompatibility will come to pass when a statute appends to an office a power or duty which generates a conflict").

The attorneys for the individual in question also contend that incompatibility may be avoided by affidavit and recusal. The letter brief states: "The proper course of action for any board member who serves on any other board, and who is placed in the position of having to contract with the agency that the board represents, would be to file the proper affidavit and recuse himself." We understand this statement to contemplate the affidavit and abstention procedure set forth in section 171.004 of the Local Government Code. That section, as well as the rest of Local Government Code chapter 171, deals with conflicts of interest of local public officials. Section 171.004(a) provides:

(a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

The attorneys' argument that affidavit and recusal are "the proper course of action" is based on the erroneous assumption that the remedy for a mere conflict of interests will be adequate to reconcile a conflict of duties. The procedure established in section 171.004 applies only to actions on matters that "will have a special economic effect" on a local public official's interest in a business entity or real property, so it applies only to pecuniary interests of such officials. Accordingly, "[t]he Texas appellate courts have interpreted the [statutory predecessor of chapter 171] as requiring that the prohibited interest by the city official be a 'personal pecuniary interest' in order to invalidate a contract." *Crystal City v. Del Monte Corp.*, 463 F.2d 976, 980 (5th Cir.), *cert denied*, 409 U.S. 1023 (1972) (citing *City of Edinburg v. Ellis*, 59 S.W.2d 99, 99 (Tex. Comm'n App. 1933, holding approved) ("It has long been the public policy of this state to prohibit officers of a city from having a personal pecuniary interest in contracts with the city and this policy is specifically expressed in both the penal and civil statutes.")); *see also* V.T.C.S. art. 988 (statutory predecessor of Local Gov't Code ch. 171), *repealed by* Act of May 28, 1983, 68th Leg., R.S., ch. 640, § 7, 1983 Tex. Gen. Laws 4079, 4082.

Chapter 171 thus deals with a conflict between the public interest that a public officer serves as a member of a governmental body and a nongovernmental, pecuniary interest that the officer may have in a specific matter that comes before the governmental body. A conflict of duties or functions that makes two offices incompatible is different from the problem that is regulated in chapter 171:

Incompatibility of office or a position is not the same as a conflict of interest. Incompatibility of office or position involves a conflict of duties between two offices or positions. While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. Incompatibility of office or position requires the involvement of two governmental offices or positions.

63A AM. JUR. 2D *Public Officers and Employees*, § 79 (1984).

Section 495.001 evidences the legislative intent that the construction of a secure correctional facility be a matter of arms-length negotiation between the board and a private vendor or a commissioners court, and section 507.001 similarly evidences the legislative intent that the construction of a state jail felony facility be a matter of arms-length negotiation between the board--or the state jail division, with the board's approval--and a commissioners court. In these circumstances, to recuse oneself from participation in the approval by either side of a construction contract between the board (or the state jail division, with the board's approval) and the commissioners court of which

No. 5626, at 545 (1980): “[A] public official’s abstention from the responsibilities of his her office in order to avoid participating in the approval of both sides of an agreement between the two public entities which he or she serves is itself a breach of duty.”). The members of the Commissioners Court of Cameron County must be able to pursue a contract with the board under section 495.001 or with the state jail division under section 507.001 if they believe such a contract would be beneficial to the county. The county judge’s forbearance to pursue a contract because of concerns about an actual or even apparent conflict of duties would be an abdication of the officer’s duty to the county.

In 1989, the legislature amended section 171.007 of the Local Government Code to provide, in part, that chapter 171 “preempts the common law of conflict of interests as applied to local public officials.” Local Gov’t Code § 171.007(a), *as amended by Act of Feb. 21, 1989, 71st Leg., R.S., ch. 1, § 40(a), 1989 Tex. Gen. Laws 1, 45*. This amendment does not affect the incompatibility doctrine, however, because, as we have just said, that doctrine involves conflicts of *duties* between offices, not the conflicts of interests regulated in chapter 171. *Cf. Tarpo v. Bowman Pub. Sch. Dist. No. 1*, 232 N.W.2d 67, 71 (N.D. 1975) (adoption of North Dakota’s conflict-of-interest statute did not abrogate common-law rule against holding incompatible offices); *Haskins v. Wyoming ex rel. Harrington*, 516 P.2d 1171, 1179 (Wyo. 1973) (Wyoming conflict-of-interest statute did not eliminate incompatibility doctrine). The common-law doctrine of incompatibility is still in force, as is evidenced by its recognition in the recent Texas Court of Criminal Appeals case of *State ex rel. Hill v. Pirtle*. See 887 S.W.2d 921, 930 (Tex. Crim. App. 1994) (citing 67 C.J.S. *Officers and Public Employees* § 27(a) (1978) for proposition that “[i]n determining incompatibility, the crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other”).

Finally, the attorneys for the individual in question suggest that if incompatibility bars a person from simultaneous service as county judge and a member of the board, then the district judges who serve on the Texas Juvenile Probation Commission (“TJPC”) are also holding incompatible offices because “[t]hese district judges vote on formulas for funding which apply to juvenile probation departments which they actually run.” This suggestion overlooks the fact that the legislature has specifically provided for district judges to serve on the TJPC. See Hum. Res. Code § 141.011. The common law has been adopted in this state “only insofar as it is not inconsistent with the laws of the state, or until altered or amended by the Legislature.” *McCloskey v. San Antonio Traction Co.*, 192 S.W. 1116, 1118 (Tex. Civ. App.—San Antonio 1917, writ ref’d); see Civ. Prac. & Rem. Code § 5.001 (adopting as rule of decision “those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state”). Incompatibility, then, being a common-law doctrine, does not apply where the legislature has enacted a contrary law. See *Lindner v. Hill*, 673 S.W.2d 611, 616 (Tex. App.—San Antonio 1984) (common law controls where no statute applies), *aff’d*, 691 S.W.2d 590 (Tex. 1985); *Houston Pipe Line Co. v. Beasley*, 49 S.W.2d 950, 952 (Tex. Civ. App.—Galveston 1932, no writ) (legislature may alter or repeal rule of common law within constitutional bounds).

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In our opinion, an individual serving as a member of two distinct governing bodies that have statutory authority to contract with each other cannot be expected to render undivided allegiance to both. In the situation you present, the board member, when negotiating with the commissioners court over the terms of a contract, should be afforded the unencumbered opportunity to consider the interests of the Texas Department of Criminal Justice, without reference to his duties as county judge. Likewise, when negotiating on behalf of the county, he should not be obliged to take into account the interests of the department. Even if the individual were able to exercise a truly Solomonic judgment in every situation, he would forever be required to defend himself against the accusation that he had subordinated one interest to the other. It is therefore our opinion that a person may not simultaneously hold the positions of county judge and member of the Texas Board of Criminal Justice.

As to the consequences of the incompatibility presented here, the court in *Thomas*, 290 S.W. 152, held that where there is an incompatibility between two positions, "the result of this incompatibility" is that the person automatically vacates the first position when he qualifies for the second. *Id.* at 153 (citing *State ex rel. Kingsbury v. Brinkerhoff*, 17 S.W. 109 (Tex. 1886)). In accordance with this pronouncement, which this office has consistently followed in numerous opinions, *see, e.g.*, Attorney General Opinion JM-133 (1984) at 2-3 (collecting authorities), we must conclude that the individual in question vacated his office as member of the Texas Board of Criminal Justice when he assumed the office of county judge on January 1, 1995.

Having so concluded, we need not consider whether the dual office-holding presented here violates the constitutional separation of powers.

S U M M A R Y

An individual is not eligible to serve as a member of the Texas Board of Criminal Justice while at the same time holding the office of county judge. Upon assumption of the office of county judge, he automatically vacated his board position.

Yours very truly,



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